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No. 604

In the Supreme Court of the United States

OCTOBER TERM, 1938

REGINALD P. RAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The *per curiam* opinion of the Circuit Court of Appeals on petition for rehearing (R. 29–31) has not yet been reported.

JURISDICTION

The judgment sought to be reviewed was entered December 4, 1936 (R. 18). A petition for rehearing and motions for re-argument (R. 19–29) were denied December 22, 1936 (R. 29–32). The petition for writ of certiorari was filed December 29, 1936. While the petitioner does not so state, he presumably invokes the jurisdiction of this Court under Section 240 (a) of the Judicial Code and

Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.[1]

QUESTIONS PRESENTED

Although the petitioner in his 35-page petition suggests a number of questions involving the interpretation of various portions of the Criminal Appeals Rules, the decisive question, we submit, is whether the bill of exceptions in this case was settled and filed within the time prescribed by the order of the District Judge of July 27, 1936.

This order, which was entered within 30 days after the taking of the appeal, as permitted by Rule IX of the Criminal Appeals Rules, extended the time for filing the bill of exceptions "to and including the 1st day of November, 1936," which was a Sunday. The bill of exceptions was not settled and filed until Monday, November 2.

RULES INVOLVED

The pertinent portions of the Criminal Appeals Rules, and Rule 8, paragraph 2, of the general Rules of this Court are printed in the Appendix, *infra*, pp. 17–19.

STATEMENT

As the question presented, as we view it, is a narrow one, we deem it necessary to present merely

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[1] As these Rules are referred to in the petition for writ of certiorari as the "Criminal Appeals Rules", they are for convenience so referred to herein.

a brief summary of what seems to us to be the material facts.[1]

On June 26, 1936, the petitioner was convicted on the verdict of a jury of a violation of the mail fraud statute and of conspiracy (R. 4, 7). He was sentenced to imprisonment for two years on June 29, 1936 (R. 5, 7). On June 30, 1936, he filed a notice of appeal to the Circuit Court of Appeals for the Second Circuit (R. 8). On July 27, 1936,

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[1] The petition for writ of certiorari is based in large measure upon statements contained in an affidavit by the petitioner in support of a petition for rehearing filed in the Circuit Court of Appeals. (R. 19–28.) It is said in the petition for writ of certiorari that these statements were "uncontradicted" (pp. 7, 8), "not controverted by the Government" (p. 12), and "undisputed" (p. 15). While present counsel for the petitioner was of course unaware of the fact, this office is advised by a letter dated January 16, 1937, from counsel who represented the Government in the litigation in the courts below, that:

"The fact is that no opportunity was given to the Government to contradict, controvert or dispute the statements in the petition. It was presented ex parte, without notice to the Government. No copy of the petition has been served on the Government counsel in charge of the matter to this day. The first knowledge that I had that an application had been made for a rehearing was the notice from the Clerk of the Circuit Court of Appeals on December 24, 1936, that the rehearing had been denied."

So far as the petition for writ of certiorari indicates that the Government, through alleged lack of cooperation with the petitioner, was in any way responsible for the failure of the petitioner to obtain a proper bill of exceptions, it would seem sufficient to quote the following from the unanimous opinion of the Circuit Court of Appeals (R. 31):

"This appellant had four months and has offered insufficient excuses for his delinquency. The bill of exceptions was insufficient."

within 30 days after the taking of the appeal, he obtained, as permitted by Rule IX of the Criminal Appeals Rules (*infra*, p. 17), an order from the District Judge extending the time to file his bill of exceptions "to and including the 1st day of November, 1936" (R. 15).

The petition for rehearing in the Circuit Court of Appeals alleges, in substance, that thereafter, on October 20, 1936, when it was apparent that condensation or reduction of the bill of exceptions to narrative form, as required by Rule IX of the Criminal Appeals Rules and Rule 8, par. 2, of the General Rules of this Court (*infra*, pp. 18–19), could not be completed within the time previously allowed for the filing of the bill of exceptions, he applied to the trial judge for an order further extending the time to settle and file the bill of exceptions; that investigation indicated that there were decisions that the trial court was without power to grant the extension, as the 30-day period following the taking of the appeal had elapsed, and that the Circuit Court of Appeals was likewise without power to grant an extension (R. 21–22);[1] that in these cir-

[1] Insofar as the petition for writ of certiorari attempts to raise the question of the power of the trial judge under Rule IX of the Criminal Appeals Rules to grant an extension of time for the filing of a bill of exceptions after thirty days from the taking of an appeal has expired (Pet. p. 20), it is evident that the petitioner is not in a position to raise this question as the record does not disclose that any order was entered by the trial judge in connection with the petitioner's application on October 20, 1936, for an extension of time to file the bill of exceptions. Even if the question had been

cumstances the petitioner, finding it impossible within the remaining time before November 1st to complete the condensation of the bill of exceptions, applied on October 22, 1936, to the Circuit Court of Appeals for an order modifying the order made by the District Judge on July 27, 1936, so as to enlarge the original period of extension; that at the argument on the motion on October 27, 1936, the petitioner took the position that the Circuit Court of Appeals had power to enter such an order under those portions of Rule IV of the Criminal Appeals Rules which provide that the appellate court "shall have supervision and control of the proceedings on the appeal, including the proceedings relating to the preparation of the record on appeal", and that "The appellate court may at any time, upon five (5) days' notice, entertain a motion * * * to vacate or modify any order made by the trial court or by any judge in relation to the prosecution of the

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properly raised, it is clearly without merit. *Spero* v. *United States*, 85 F. (2d) 134, certiorari denied November 23, 1936 (No. 466 present term). No conflict was established by the decision in *Fierman* v. *United States*, 84 F. (2d) 948 (C. C. A. 3d), to which the petitioner refers. As is pointed out by the Government in its brief in opposition in the cases of *Oary* and *Williams* v. *United States*, Nos. 592 and 593, present term, now pending, the bill of exceptions in the *Fierman* case was out of time even under the practice obtaining prior to the promulgation of Rule IX of the Criminal Appeals Rules. Any suggestion in the opinion in the *Fierman* case of a holding that Rule IX permits a trial judge to grant an extension of time for the filing of a bill of exceptions after thirty days have elapsed from the taking of an appeal was clearly dictum and not an adjudication to that effect.

appeal, * * *"; that the court said, among other things, that "it did not consider Rule IV broad enough to grant the relief sought and thereupon unanimously suggested as a compromise measure that, under the circumstances of my case, in order to avoid any jurisdictional question, an application be made to the trial judge for an order settling the typewritten stenographer's minutes of the trial as the bill of exceptions and that thereafter an application might be made to this court for time to prepare, agree upon, and print the condensed record under Rule IX, in Criminal Cases, which provides: 'The appellate court may at any time, on five (5) days' notice, entertain a motion by either party for the correction, amplification, or reduction of the record filed with the appellate court and may issue such directions to the trial court, or trial judge, in relation thereto, as may be appropriate.'" (R. 22–23.)[4]

The petitioner does not assert that any order was entered by the Circuit Court of Appeals in connec-

[4] While the petitioner in the petition for rehearing (R. 22) states that he sought relief from the Circuit Court of Appeals because he found it impossible to complete the condensation of the bill of exceptions within the time which remained before November 1st, an attorney who assisted him in connection with the appeal to the Circuit Court of Appeals states in an affidavit attached to the petition for writ of certiorari (p. 39) that "Your deponent further states that on October 27, 1936, when the Circuit Court of Appeals suggested the procedure finally adopted, it was stated to that court, in response to its question, that so far as the petitioner was concerned a narration and condensation for settlement could be completed within the time still remaining."

tion with the proceeding just referred to, and the clear inference from the petition for rehearing is that no order was entered.[5]

The petition for rehearing then goes on to allege that in pursuance of the suggestion of the Circuit Court of Appeals and after some preliminary efforts in the District Court, the trial judge on Monday, November 2, over the objection of Government counsel, settled the stenographer's minutes of the trial, as condensed by the elimination of 700 pages involving colloquy of counsel, as the bill of exceptions, and that the bill was filed with the Clerk of the District Court on the same day (R. 23–25; see also 15–16).[6] On November 12, 1936, the Govern-

[5] As no order was entered by the Circuit Court of Appeals in connection with the petitioner's effort to secure a modification under Rule IV of the Criminal Appeals Rules of the order of the District Judge of July 27, 1936, so as to enlarge the time for filing the bill of exceptions, there is obviously no basis for review in this Court of the question raised in the petition for writ of certiorari (p. 21) as to the power of the Circuit Court of Appeals under Rule IV to modify a timely order of extension for the filing of a bill of exceptions by the trial judge by lengthening the extension. It may also be pointed out that in *United States* v. *Adamowicz*, 82 F. (2d) 288 (C. C. A. 2d), certiorari denied 298 U. S. 664, the power of a judge of the Circuit Court of Appeals to grant an extension of time for the filing of a bill of exceptions was attempted to be supported in this Court under Rule IV of the Criminal Appeals Rules.

[6] In an affidavit filed by the Government in the Circuit Court of Appeals in support of a motion to docket and dismiss the appeal, it is stated that on November 2, 1936, the appellant presented to the trial judge 5 volumes of the typewritten stenographic minutes of the trial, with colloquy of

ment filed in the Circuit Court of Appeals a motion to docket and dismiss the appeal (R. 11–16).[1] Simultaneously there appears to have been filed in the Circuit Court of Appeals a motion by the petitioner to correct the record (R. 30). This motion is not set out in the record, but its purpose apparently was to permit the reduction of the bill of exceptions to narrative form as required by the Rules of this Court (Rule IX of the Criminal Appeals Rules; Rule 8, par. 2, of the General Rules), the theory being that the Circuit Court of Appeals had this power under the provision of Rule IX of the Criminal Appeals Rules which permits the appellate

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counsel omitted, and two volumes containing the summation of the prosecuting attorney and the charge of the trial court and other proceedings after the trial, consisting of 3,981 pages in all, and requested that they be settled and signed as the bill of exceptions in the case; that this motion was granted; that the Government opposed the granting of the motion on the grounds, among others, that the proposed bill of exceptions was not in narrative form as required by the Rules of this Court (Rule IX of the Criminal Appeals Rules; Rule 8, par. 2 of the General Rules), although the appellant had had the minutes of the trial in his possession for four months; and that the District Judge was without power on November 2, 1936, to sign the bill of exceptions, inasmuch as the extended time under the order of July 27, 1936, had expired on November 1, 1936 (R. 13–14).

[1] While, as the petitioner suggests, a motion to docket and dismiss was not the proper procedure under the Criminal Appeals Rules, the petitioner does not deny that it was competent for the Circuit Court of Appeals to regard the motion as a motion filed under paragraph 3 of Rule IV of the Criminal Appeals Rules (*infra*, p. 17) to dismiss the appeal because of jurisdictional defects. (Pet. pp. 18–19).

court on motion by either party to correct, amplify or reduce the record filed with the appellate court or to issue directions to the trial court with relation thereto. On December 22, 1936, the court denied this petition, which it considered as a motion for re-argument of the motions to correct the record and to dismiss the appeal (R. 29–32). In its *per curiam* decision the Circuit Court of Appeals held that as the trial judge's order extending the time for filing of bill of exceptions expired on a Sunday (November 1, 1936), the settlement and filing of bill of exceptions on the following Monday were in time under Rule XIII of the Criminal Appeals Rules (*infra*, p. 18). The court held, however, that it had no power under Rule IX of the Criminal Appeals Rules to itself permit the reduction of the bill of exceptions to narrative form or to transmit the bill of exceptions to the trial court for that purpose for the reasons that while it could correct a record so as properly to reflect the proceedings in the District Court by adding papers not certified by the clerk or striking out some which may not be necessary, and while it could of course correct its own record if it is not stated properly, "the bill of exceptions * * * is determined and settled by the district judge alone and we may not correct or change it"; that it could not remit the bill of exceptions to the trial judge for reduction to narrative form because Rule IX of the Criminal Appeals Rules imposes a time limit upon the settle-

ment of the bill of exceptions which could not be enlarged, in consequence of which, if the bill of exceptions were remitted to the trial judge, he would be powerless to correct, amend or resettle it as the time to do so had expired; that its only power under the circumstances was to strike out the bill of exceptions for non-compliance with the rules of this Court requiring the bill of exceptions to be reduced to narrative form. It added that the petitioner had had four months within which to prepare a proper bill of exceptions and had offered no sufficient excuse for his delinquency. (R. 29–31.)

ARGUMENT

While we believe that the Circuit Court of Appeals was correct in holding in this case that it had no power under Rule IX of the Criminal Appeals Rules, after the time for filing the bill of exceptions had expired, to permit, or to direct the District Judge to permit, the reduction of the bill to narrative form, as this would set at naught the time limitation imposed upon the filing of bills of exceptions by Rule IX, we submit that the decision of the Circuit Court of Appeals can be supported upon a ground as to which there is even less question.

The only order extending the petitioner's time for filing his bill of exceptions entered by the trial judge was that of July 27, 1936. This order, which was entered within thirty days after the taking of the appeal, as permitted by Rule IX, ex-

tended the petitioner's time for filing his bill of exceptions "to and including the 1st day of November, 1936" (R. 15). The bill of exceptions was not settled and filed until November 2, 1936, (R. 15–16).

The Circuit Court of Appeals, without the citation of any authority, held (R. 30) that the settlement and filing of the bill of exceptions on November 2, 1936, was in time because the last day of the extension for such purpose, November 1, fell on a Sunday. It reached this conclusion because of the provision of Rule XIII of the Criminal Appeals Rules that:

> For the purpose of computing time as specified in the foregoing rules, *Sundays* and legal holidays (whether under Federal law or under the law of the State where the case was brought) shall be excluded. (Italics ours.)

In so holding we think it is obvious that the court was in error. Rule XIII expressly provides that Sundays and legal holidays are to be excluded "for the purpose of computing time as specified in the foregoing rules." It is evident therefore that Sundays and legal holidays are to be excluded only where it is necessary to compute time under the prior provisions of the Rules. By reference to the Rules it will be seen that certain periods of time, measured in days, were fixed for the doing of certain acts. For example, an appeal must be taken by a defendant "within five days" (Rule III); the bill of exceptions must be filed "within thirty days"

after the taking of the appeal, unless an extension is granted by the trial judge within that period (Rule IX); a petition for writ of certiorari must be filed in this Court "within thirty days" after the entry of the judgment below. (Rule XI.) Prior to the promulgation of the Criminal Appeals Rules the Federal courts had uniformly held that where certain periods of time, measured in months or days, were fixed for the taking of appeals, or the filing of petitions for writs of certiorari or bills of exceptions, and the last day of such period fell on a Sunday, or a legal holiday, action on the following [redacted]day was too late. *Gotham Can Co.* v. *United States,* 281 U. S. 706; *Maresca* v. *United States,* 277 Fed. 727, 733 (C. C. A. 2d), certiorari denied, 257 U. S. 657; *Siegelschiffer* v. *Penn-Mut. Life Ins. Co.,* 248 Fed. 226 (C. C. A. 2d), (see also *Ex parte Siegelschiffer,* 246 U. S. 654); *Walters* v. *Baltimore & O. R. Co.,* 76 F. (2d) 599 (C. C. A. 3d); *Larkin Packer Co.* v. *Hinderliter Tool Co.,* 60 F. (2d) 491, 493 (C. C. A. 10th); *Northwestern Public Service Co.* v. *Pheiffer,* 36 F. (2d) 5 (C. C. A. 8th); *Johnson* v. *Meyers,* 54 Fed. 417 (C. C. A. 8th); *Meyer* v. *Hot Springs Imp. Co.,* 169 Fed. 628 (C. C. A. 9th). It was undoubtedly to prevent the application of these decisions in computing the various time limits prescribed in the Criminal Appeals Rules, as well as to permit the exclusion of intervening Sundays and legal holidays in such computation, that the provision was inserted in Rule XIII upon which the court below relied.

While it would undoubtedly follow that by virtue of this provision of Rule XIII Sundays and legal holidays would be excluded in the computation of the time for filing a bill of exceptions where the trial judge pursuant to the authority contained in Rule IX grants an extension, within thirty days after the taking of the appeal, of a certain number of days or months for the filing of the bill of exceptions (cf. *Yep* v. *United States*, 83 F. (2d) 41, 42 (C. C. A. 10th)), it is apparent that we do not have such a situation presented here. In the instance cited the trial judge must be presumed to have acted in the light of the provision of Rule XIII excluding Sundays and legal holidays in computing time, but in the present case the order of the trial judge expressly extended the time for filing the bill of exceptions "to and including the 1st day of November, 1936." This order was clear and unambiguous and it is apparent that the trial judge at the time it was entered intended that the bill of exceptions should be settled and filed by November 1, 1936, and not afterwards. The order needs no construction and it involves no computation of time. Under this order there is no more reason to exclude the last Sunday than any of the intervening Sundays and legal holidays during the period of the extension. We submit, therefore, that where, as in this case, the trial judge by his order of extension has fixed the last day beyond which the settling and filing of a bill of exceptions will not be allowed, the fact that the last day falls on

a Sunday does not permit the settling and filing of the bill of exceptions on a Monday. Cf. *Maresca* v. *United States*, 277 Fed. 727, 732–733 (C. C. A. 2d), *supra*, in which this Court denied a petition for writ of certiorari, 257 U. S. 657. The principle is well illustrated by the decision of the Supreme Court of Massachusetts in *Cooney* v. *Burt*, 123 Mass. 579, in which it was said:

> The question presented does not depend upon the rules which govern the computation of time when the last of a certain number of days allowed by statute or by general rule of court happens to fall on a Sunday or other legal holiday; but upon the construction of the special order made by the judge in this case, which did not define the time by the number of days, but by a particular date, and, as stated in his certificate, was that "the time for filing and presentment of these exceptions was extended by the court to April 12," and clearly did not allow them to be presented to him after that day. * * *
>
> *Exceptions dismissed.*

If, as we submit, the bill of exceptions was filed out of time, it was clearly a nullity and the Circuit Court of Appeals was obviously without power under Rule IX or otherwise to allow its correction or amendment by reduction to narrative form. Cf. *Michigan Ins. Bank* v. *Eldred*, 143 U. S. 293, 298; *Exporters Co.* v. *Butterworth Judson Co.*, 258 U. S. 365, 367.

Some point is made in the petition for writ of certiorari that the Circuit Court of Appeals should not have dismissed the appeal on account of the defect in the bill of exceptions because it did not have the assignment of errors before it and was consequently not in a position to know whether there were questions arising on the record proper which it should consider. While the grounds for appeal included in the petitioner's notice of appeal raise questions as to the denial of a motion to dismiss the indictment and a motion in arrest of judgment (R. 9), petitioner expressly states that he "does not suggest" that the assignment of errors included any going to the record proper (Pet. p. 14). And no such suggestion was made to the Circuit Court of Appeals in the petition for rehearing (R. 19–27). While examination of a copy of the assignment of errors filed by the petitioner in the District Court discloses that one of them alleged that "47. The Court erred in denying the motions made on behalf of the defendant Ray to set aside the verdict and grant a new trial, and in arrest of judgment (s. m. p. 3970)," none of these motions have been incorporated in the transcript of record in this Court, and it therefore cannot be determined on this record whether any of these motions presented questions arising on the record proper or whether they were confined to matters occurring at the trial. The burden is, of course, upon the petitioner to establish that he was prejudiced because the Cir-

cuit Court of Appeals dismissed the appeal instead of merely striking out the bill of exceptions.

CONCLUSION

The controlling question in this case is not of general public importance and involves no conflict of decisions. We therefore respectfully submit that the petition for writ of certiorari should be denied.

STANLEY REED,
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BRIEN MCMAHON,
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WILLIAM W. BARBOUR,
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Attorneys.

JANUARY 1937.

APPENDIX

Rules IV and IX of the Criminal Appeals Rules are as follows:

IV. *Control by Appellate Court.*—The clerk of the trial court shall immediately forward the duplicate notice of appeal to the clerk of the appellate court, together with a statement from the docket entries in the case substantially as provided in the form hereto annexed.

From the time of the filing with its clerk of the duplicate notice of appeal, the appellate court shall, subject to these rules, have supervision and control of the proceedings on the appeal, including the proceedings relating to the preparation of the record on appeal.

The appellate court may at any time, upon five (5) days' notice, entertain a motion to dismiss the appeal, or for directions to the trial court, or to vacate or modify any order made by the trial court or by any judge in relation to the prosecution of the appeal, including any order for the granting of bail.

IX. *Bill of Exceptions.*—In cases other than those described in Rule VIII,[1] the appellant, within thirty (30) days after the taking of the appeal, or within such further time as within said period of thirty days may be fixed by the trial judge, shall procure to be settled, and shall file with the clerk of the court in which the case was tried, a bill

[1] Rule VIII is not here material, as it covers appeals which are prosecuted without bills of exceptions.

of exceptions setting forth the proceedings upon which the appellant wishes to rely in addition to those shown by the clerk's record as described in Rule VIII. Within the same time, the appellant shall file with the clerk of the trial court an assignment of the errors of which appellant complains. The bill of exceptions shall be settled by the trial judge as promptly as possible, and he shall give no extension of time that is not required in the interest of justice.

Bills of exceptions shall conform to the provisions of Rule 8 of the Rules of the Supreme Court of the United States.

Upon the filing of the bill of exceptions and assignment of errors, the clerk of the trial court shall forthwith transmit them, together with such matters of record as are pertinent to the appeal, with his certificate, to the clerk of the appellate court, and the papers so forwarded shall constitute the record on appeal.

The appellate court may at any time, on five (5) days' notice, entertain a motion by either party for the correction, amplification, or reduction of the record filed with the appellate court and may issue such directions to the trial court, or trial judge, in relation thereto, as may be appropriate.

The pertinent portion of Rule XIII of the Criminal Appeals Rules is as follows:

> For the purpose of computing time as specified in the foregoing rules, Sundays and legal holidays (whether under Federal law or under the law of the State where the case was brought) shall be excluded.

Rule 8, paragraph 2 of the general rules of this Court provides as follows:

> Only so much of the evidence shall be embraced in a bill of exceptions as may be

necessary to present clearly the questions of law involved in the rulings to which exceptions are reserved, and such evidence as is embraced therein shall be set forth in condensed and narrative form, save as a proper understanding of the questions presented may require that parts of it be set forth otherwise. See Equity Rule 75b, 226 U. S. Appendix, p. 23, as amended, 286 U. S. 570.

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